Petition

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

81-1800
No.

In the Supreme Court of the United States

October Term, 1981

WHITE-WILSON MEDICAL CLINIC, INC.,
Petitioner,

vs.

DELORES J. ROBBINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETER W. ZINOBER
(Counsel of Record)
TERENCE M. BROWN
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601
(813) 223-5366
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

WHETHER A FEDERAL COURT OF APPEALS IS BOUND BY THE "CLEARLY ERRONEOUS" RULE OF FED. R. CIV. P. 52(a) IN REVIEWING A DISTRICT COURT'S FINDINGS OF FACT AS TO WHETHER AN EMPLOYER DISCRIMINATED IN EMPLOYMENT AGAINST A PLAINTIFF ON THE BASIS OF RACE, AND WHAT THE MOTIVATION OF THE EMPLOYER WAS IN MAKING THE CHALLENGED DECISION, WHERE SUCH FINDINGS WERE ISSUED FOLLOWING A FULL TRIAL ON THE MERITS.

LIST OF PARTIES

The petitioner is White-Wilson Medical Clinic, Inc. There are two business enterprises affiliated with petitioner: White-Wilson Properties, a partnership, and White-Wilson Medical Center, a partnership.

The respondent is Delores J. Robbins.

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No.

In the Supreme Court of the United States

October Term, 1981

WHITE-WILSON MEDICAL CLINIC, INC.,
Petitioner,

vs.

DELORES J. ROBBINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

White-Wilson Medical Clinic, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Robbins v. White-Wilson Medical Clinic, Inc.*, 660 F.2d 1064, entered on November 12, 1981.

OPINIONS BELOW

The opinion of the district court is an unpublished decision and is reprinted in the appendix to this Petition. The original opinion of the court of appeals is reported at 642 F.2d 153 (5th Cir. 1981). This opinion was withdrawn and the submission vacated on other grounds, by an order reported at 645 F.2d 252. The second opinion of the court of appeals - the decision from which certiorari is sought - is reported at 660 F.2d 1064 and is reprinted in the appendix to this Petition.

JURISDICTION

The court of appeals issued its decision on November 12, 1981. Petitioner thereupon filed a timely motion for rehearing. On February 12, 1982, the court of appeals entered an order denying the motion for rehearing. This Petition was filed within 90 days of the latter date. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

Title VII of the Civil Rights Act of 1964, Section 703(a), 42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory

to make and enforce contracts, to sue, be parties; give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rule 52(a), Fed.R.Civ.P.:

RULE 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

A. Factual Background

Respondent Delores Robbins brought suit against White-Wilson Medical Clinic, Inc., alleging that its failure to hire her violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

Ms. Robbins, the respondent, submitted an application for employment to the petitioner, a privately-owned medical clinic located at Ft. Walton Beach, Florida, early in January of 1978. At the time Ms. Robbins applied for a position at the clinic, there were no positions open; however, a job as record room clerk became open at the end of the month. Fourteen applicants including Ms. Robbins, were selected by Marilyn Pollard, the record room supervisor, for personal interviews. On February 3rd, 1978, Ms. Robbins was personally interviewed for the record room clerk position by Ms. Pollard. Ms. Pollard had the authority to evaluate the applicants and recommend her choice for the position to Theodore Rahe, petitioner's administrator. Her recommendations were afforded great weight and were routinely approved. In this instance, Ms. Pollard recommended that Ms. Vickie Kraftchick be hired and the recommendation was followed. Ms. Robbins was later advised that she was not selected for the position. The other twelve interviewees not selected for the position were white.

B. The District Court's Opinion

The district court, by Order dated December 18, 1979, partially granted respondent's motion for summary judgment, deciding as a matter of law that respondent had es-

tablished the necessary elements of a prima facie case of employment discrimination. A non-jury trial was commenced and concluded on May 6, 1980.

1. Petitioner Established a Legitimate, Non-Discriminatory Reason for Not Hiring Respondent

After close scrutiny of the petitioner's employment process, hearing the testimony, and observing the demeanor and credibility of all witnesses, the district court concluded that the petitioner had rebutted the respondent's showing of a prima facie case of discrimination by establishing a legitimate, non-discriminatory reason for not hiring Ms. Robbins.

The court found that the position of record room clerk required a person with a "good personality and attitude enabling the applicant to relate well to other employees working in a small, pressure-filled environment." "The employee must not only be able to get along with her fellow record room clerks but must also be able to get along with doctors and nurses, who place great demands upon the staff." (App. A19).

The district court found that Ms. Pollard "did not believe plaintiff had the type of personality that would enable her to work well on the job" and that "Ms. Kraftchick was, in Ms. Pollard's opinion, the most qualified applicant because she possessed a vital, albeit intangible, asset - an outgoing personality that was well-suited to a high pressure job." (App. A20).

In this connection, the district court found:

> Given the nature of the position at issue, a requirement that an applicant have the type of personality that enables her to relate well to others and remain

pleasant under stress is a legitimate one. In determining that Ms. Kraftchick had a personality better suited for the job than plaintiff and in hiring her on that basis, defendant has demonstrated a legitimate non-discriminatory reason for not hiring plaintiff. (App. A21).

2. Respondent Failed to Demonstrate That the Reasons Articulated by Petitioner Were a Pretext for Discrimination

The district court held that respondent did not meet her burden in showing that the articulated reasons were a pretext for discrimination, observing that "this court does not believe that race played any part in Ms. Pollard's decision." (App. A21).

The court observed that proper resolution of this case depended almost exclusively upon the determination of whether Ms. Pollard was motivated by racial bias or animus in rejecting the respondent's application for employment. As noted in the court's memorandum decision, Ms. Pollard was therefore examined at length, particularly concerning some statements suggestive of racial bias which she volunteered in answering questions. (App. A21). In this connection, the district court found:

> The conclusion is reached from all of her testimony that she possesses no racial bias or animus as such and racial bias or animus played no part in rejection of plaintiff's application. It seems apparent from her testimony that she associates in her own mind certain personality characteristics as being more prevalent in the white than in the black race. But she has no bias or prejudice against the black race. To her people are people regardless of their race. (App. A21).

Ms. Kraftchick, the applicant selected for the record room position, also testified at trial. The district court found, based on its own observation of Ms. Kraftchick, that she "does indeed possess the kind of personality that Ms. Pollard testified she felt was so important." (App. A22).

The district court therefore concluded that it did not appear from a preponderance of the evidence that the petitioner discriminated against the respondent on the basis of her race.

C. The Court of Appeals' Decision

The Fifth Circuit Court of Appeals, in a 2-1 decision, reversed the district court's finding and held that the respondent through Ms. Pollard, its supervisor, discriminated against Ms. Robbins on the basis of her race by not employing her. Citing the controlling rule in the Fifth Circuit - that "[b]ecause a finding of discrimination *vel non* is an ultimate fact, we must make an independent determination of the allegations of discrimination" - the court of appeals premised its reversal on its own finding that "Mrs. Pollard's rejection of plaintiff for the job appears to have been influenced by racially oriented criteria." (App. A12).

The majority of the court of appeals' panel explained its holding as follows:

> The district judge's extensive questioning of Mrs. Pollard on this point reflects his justified concern with her remarks. In spite of this apparent tendency and an explicit finding of fact that Mrs. Pollard possessed such a tendency, however, the trial judge concluded, on the basis of countervailing evidence of Mrs. Pollard's and her son's social relations with blacks, that "she possesses no racial bias or animus as such." We agree

> that the evidence supports these findings of subsidiary fact, but we believe that the district judge drew incorrect legal conclusions from them. Specifically, we disagree that the evidence supports the legal conclusion that racial bias played no part in the employment decision in this case. (App. A12).
>
> * * *
>
> Without discrediting Mrs. Pollard's testimony or ignoring the district judge's findings, we may conclude nevertheless as part of our independent review of the finding of the ultimate fact of discrimination *vel non* that Mrs. Robbins' rejection was racially motivated or was the result of racial sterotyping. (App. A12).

Judge Smith, dissenting from the majority opinion, concluded that the subsidiary facts were more than adequate to support the district court's finding on the ultimate fact of discrimination. (App. A13). He explained his decision as follows:

> This appeal is based primarily if not entirely on the issue of alleged racial bias or animus on the part of Mrs. Pollard. The evidence does not support such a finding. This would not even be a close case were it not for Mrs. Pollard's outdated, unacceptable, stereotypical descriptions, and her ingenuous inability to recognize them as such. But Title VII is not intended to and in any event could not possibly eliminate all of the stereotypical expressions in an imperfect world; its purpose is to assure that the *reason* for denial is not bias or animus. Mrs. Pollard seems obviously incapable of speaking in language which meets the test of modern race-free expression; so much so that the trial judge personally examined her closely and in detail on the question of discrimination on the basis

of bias and prejudice. Her full testimony clearly showed that she had none; therefore none can be imputed to defendant. Plaintiff had her day in court, and the trial judge exercised his duty of close scrutiny and found that race played no part in Mrs. Pollard's decision to reject her. On the facts of this record, we should not substitute a contrary belief for the conclusion of the judge who conducted the trial. (App. A16).

In explaining his decision, Judge Smith cautioned the majority:

> This court must certainly guard against a nibbling away of its record of firm and judicious efforts to support the elimination of illegal discrimination; but this case comes to us essentially as one involving standard of review, and not civil rights. This case is not an appropriate one for the court to use to emphasize its continuing vigilance in the latter area; not with these facts; not with these parties; not with an unfairly imposed penalty on this clinic. (App. A15).

REASONS FOR GRANTING THE WRIT

Introduction

The court below reversed the district court's finding that the proffered explanation for the employment decision not to hire respondent was not a pretext for discrimination. It did so despite the finding of the district court that racial bias or animus played no part in the rejection of the plaintiff's application. The district court's finding was based, *inter alia*, on the following subsidiary findings: (1) requiring the record room clerk to have a personality which would enable her to relate well to others and remain pleasant under stress was a legitimate job re-

quirement; (2) Ms. Pollard did not believe that Ms. Robbins had the type of personality that would enable her to perform well on the job; (3) Ms. Kraftchick was selected for the position based on the belief that she had a personality better suited to the job and its requirements; (4) Ms. Kraftchick appeared to the court to possess the kind of personality that Ms. Pollard had testified as being so important to performing satisfactorily in the job; (5) Ms. Pollard had no bias or prejudice against the black race; and (6) the absence of black applicants was not the result of any deliberate action by the petitioner.

The court of appeals did not set those subsidiary factual findings aside or find them to be clearly erroneous. Rather, applying the Fifth Circuit approach to review of district court findings in Title VII cases, which this Court already has under consideration in *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), *cert. granted*, 101 S.Ct. 1972 (1981) i.e., that the appeals court may make an "independent determination," "free of the clearly erroneous rule," of the existence *vel non* of a discriminatory purpose - the Fifth Circuit substituted its finding of a discriminatory purpose for the contrary finding of the district court. Given the condition that the subsidiary findings of the district court were not clearly erroneous, it seems almost impossible to have extrapolated from the subsidiary findings an ultimate finding of discriminatory purpose at variance with that of the district court.

The application of this expansive doctrine of appellate review is particularly egregious in this case, which turns almost exclusively on the credibility of one witness - Ms. Marilyn Pollard.[1] The district judge cross-examined Ms.

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1. Both the district court and the court of appeals acknowledged that this case turns upon a determination of whether Ms. Pollard was motivated by racial bias or animus in rejecting the respondent's application.

Pollard in great detail, and also had the opportunity to observe the personalities of Ms. Robbins and Ms. Kraftchick. It is upon the credibility of these witnesses that the ultimate finding of fact rests.

The courts of appeals are in disagreement as to whether Rule 52(a) applies to ultimate findings of motivation in discrimination cases. This Court should resolve the conflict among the circuits on this issue.

The Decision Below Conflicts With Decisions of Other Circuits in Its Holding That a Court of Appeals May "Independently Determine" the Existence of Discriminatory Purpose Free of the Strictures of Rule 52(a).

In the instant case, an experienced trial judge, who had the opportunity for first-hand observation of the witnesses and who cross-examined in great detail the principal witness on whose credibility the entire case turns, made a careful evaluation of whether the respondent was discriminated against on the basis of race. He issued findings of fact which are eminently sound, persuasively reasoned, and supported by substantial record evidence at every step of his analysis. The court of appeals, however, has substituted its own "ultimate" finding on the motivation issue.

The appellate activism reflected in this case is symptomatic of a general disregard by the Fifth Circuit for the proper allocation of responsibilities between district courts and courts of appeals in determining the existence or nonexistence of discriminatory purpose in Title VII cases. The key to its performance in the instant case is the Fifth Circuit's rule, which this Court already has under consideration in *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), *cert. granted*, 101 S.Ct. 1972 (1981), that Rule 52(a) does not control appellate review of district court findings

respecting discriminatory purpose in Title VII cases, so that the appeals court may make an "independent determination," "free of the clearly erroneous rule," of the existence or non-existence of discriminatory purpose. *Joshi v. Florida State University*, 646 F.2d 981, 986 (5th Cir. 1981); *Thompson v. Leland Police Department*, 633 F.2d 1111, 1112 (5th Cir. 1980).[2] This Fifth Circuit view was most fully articulated in *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975):

> With respect to ultimate findings of fact, furthermore, we noted in *Industrial Instrument Corp. v. Foxboro Co., supra*, 307 F.2d at 786 n.2:
>
> > We may reverse free of the clearly erroneous rule where . . . the issue revolves around an ultimate fact question as distinguished from subsidiary fact questions. . . .
>
> See also *Galena Oaks Corp. v. Scofield, supra*, 218 F.2d at 219.
>
> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. See *Hester v. Southern Railway Co.*, 5 Cir., 1974, 497 F.2d 1374, 1381; *United States v. Jack-*

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2. The Fifth Circuit has invoked its "free[dom]" from Rule 52(a) to overturn district court findings of absence of discriminatory purpose in *Causey v. Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *Burdine v. Texas Dept. of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), *reversed on other grounds*, 101 S.Ct. 1089 (1981); *Crawford v. Western Electric Co.*, 614 F.2d 1300 (5th Cir. 1980); *Ramirez v. Sloss*, 615 F.2d 163 (5th Cir. 1980). We were able to locate no instance in which the rule was invoked to overturn a district court finding of the *existence* of discriminatory purpose.

> *sonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 423-24. In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.

East, 518 F.2d at 339.[3]

Only one circuit has followed the lead of the Fifth in holding that Rule 52(a)'s "clearly erroneous" standard is not applicable in reviewing district court findings respecting discriminatory purpose. *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976). Two circuits have expressly disapproved the Fifth Circuit's rule, concluding that Rule 52(a) *does* control findings of discriminatory purpose. *Sweeney v. Bd. of Trustees of Keene State College*, 604 F.2d 106, 109 n.2 (1st Cir. 1979), *cert. denied*, 100 S.Ct. 733 (1980); *Kunda v. Muhlenberg College*, 621 F.2d 532, 544 (3rd Cir. 1980) (citing *Sweeney*). The remainder of the circuits have applied Rule 52(a) to ultimate findings of discrimination without adverting to the Fifth Circuit's contrary rule. *Bostic v. Boorstin*, 617 F.2d 871, 875 n.18 (D.C. Cir. 1980); *Duckett v. Silberman*, 568 F.2d 1020, 1023 (2nd Cir. 1978); *EEOC v. Chesapeake & Ohio Ry.*, 577 F.2d 229, 233 (4th Cir. 1978); *Smith v. South Central Bell Telephone Co.*, 518 F.2d 68, 69 (6th Cir. 1975); *Kendrick v. Comm. of Zoological Subdistrict*, 565 F.2d 524, 526-527 (8th Cir. 1977); *Agarwal v. Arthur G. McKee and Co.*, 644 F.2d 803 (9th Cir. 1981); *Pack v. Energy Research & Development Administration*, 566 F.2d

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3. There can be no question but that the decision below was infected by the Fifth Circuit's erroneous view that Rule 52(a) is inapplicable in reviewing findings of discriminatory purpose.

1111, 1113 (9th Cir. 1977); *Siberhorn v. General Iron Works Co.*, 584 F.2d 970, 971 (10th Cir. 1978).

The Fifth and Seventh Circuit rulings are inconsistent with this Court's precedents. This Court has already held that the clearly erroneous standard of Rule 52(a) applies generally in reviewing "[f]indings as to the design, motive and intent with which men act," *United States v. Yellow Cab Co.*, 338 U.S. 338, 341, 342 (1949), and in reviewing findings respecting racially discriminatory purpose, *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534 n.8 (1979).

The clear intent of Rule 52(a) is to prevent the courts of appeals from supplanting careful, conscientious and considered court evaluations of the evidence with independent appellate findings of fact. The court of appeals' seriously flawed findings here attest to the wisdom of Rule 52(a) - if such attestation is needed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted by this Court.

Respectfully submitted,

PETER W. ZINOBER
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH AND CUTLER, P.A.
P. O. Box 3239
Tampa, Florida 33601

PROOF OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 1982, three copies of the Petition for a Writ of Certiorari in the case of *White-Wilson Medical Center, Inc. v. Delores J. Robbins* were mailed, first-class postage prepaid to Joseph L. Hammons, Esquire, 412 W. Gregory, Pensacola, Florida 32501, and to William D. Wells, Esquire, 1790 Broadway, New York, N.Y. 10019, Counsel for Respondent. I further certify that all parties required to be served have been served.

PETER W. ZINOBER
(Counsel of Record)
CARLTON, FIELDS, WARD, EMMANUEL, SMITH AND CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601
(813) 223-5366
Counsel for Petitioner White-Wilson Medical Clinic, Inc.

Appendix

APPENDIX

Delores J. ROBBINS,
Plaintiff-Appellant,

v.

WHITE-WILSON MEDICAL CLINIC,
INC., Defendant-Appellee.

No. 80-5442.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 12, 1981.

A black female brought suit under the equal employment opportunity provisions of the Civil Rights Act of 1964 and equal rights statute but the United States District Court for the Northern District of Florida, at Pensacola, Winston E. Arnow, J., ultimately entered judgment for the defendant employer. Plaintiff appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that in view of evidence indicating that employer's job qualifications were subjective, including requirement of "pleasant" personality and evidence indicating that employer's interviewer, whose impression of applicant was controlling factor in decision not to hire, had tendency to equate pleasant personality characteristics, and particularly ability to work well with others, with white people, case was one of those where plaintiff's initial evidence, combined with effective cross-

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

examination of defendant, sufficed to discredit defendant employer's explanation for not hiring plaintiff.

Reversed and remanded.

Smith, J., sitting by designation, dissented and filed opinion.

1. Federal Courts (Key) 755, 858

Because finding of discrimination vel non is ultimate fact, Court of Appeals must make independent determination of allegations of discrimination in equal employment opportunity suit under Civil Rights Act of 1964 and equal rights statute but Court of Appeals is bound by trial court's credibility determinations and findings of subsidiary facts which are not themselves clearly erroneous, examining only whether there are sufficient subsidiary facts to support district court's conclusion on ultimate fact. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

2. Civil Rights (Key) 44(1)

Once plaintiff has made proper prima facie case out of racial discrimination in equal employment opportunity case, defendant has only burden of producing nondiscriminatory justification, not burden of persuasion, by preponderance of evidence, but though burden has been lessened to one of production rather than persuasion, sufficiency of employer's explanation must be evaluated by extent to which it affords plaintiff, through clarity and specificity of proper reasons, full and fair opportunity to demonstrate pretext. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

3. Civil Rights (Key) 44(1)

The more subjective the employment qualification sought and the more subjective the manner in which it is measured, the more difficult will be defendant employer's task, in equal employment opportunity suit, of meeting prima facie case by producing nondiscriminatory justification. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

4. Civil Rights (Key) 44(1)

In view of evidence indicating that employer's job qualifications were subjective, including requirement of "pleasant" personality and evidence indicating that employer's interviewer, whose impression of applicant was controlling factor in decision not to hire, had tendency to equate pleasant personality characteristics, and particularly ability to work well with others, with white people, case was one of those where plaintiff's initial evidence, combined with effective cross-examination of defendant, sufficed to discredit defendant employer's explanation for not hiring plaintiff. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

Appeal from the United States District Court for the Northern District of Florida.

Before HILL, Circuit Judge, SMITH**, Judge, and HENDERSON, Circuit Judge.

JAMES C. HILL, Circuit Judge:

Plaintiff, a black female, brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. § 1981, alleging that the defendant clinic denied

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**Judge U.S. Court of Claims sitting by designation.

her employment on the basis of race. The district court granted plaintiff's motion for summary judgment to the extent that plaintiff had established the necessary elements of a prima facie case of employment discrimination set forth in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Following a non-jury trial, however, the judge concluded that the defendant had established a legitimate, nondiscriminatory reason for refusing to hire plaintiff and that plaintiff had failed to prove by a preponderance of the evidence that the articulated reason was a pretext for discrimination. Accordingly, the district court entered judgment for defendant. We now reverse.

I. Facts

Early in January 1978, Mrs. Robbins submitted an application for employment to the White-Wilson Medical Clinic, a privately owned medical clinic located in Fort Walton Beach, Florida that provides out-patient services to residents of northwest Florida and southern Alabama. Prior to the filing of Mrs. Robbins' E.E.O.C. charge, the only black employees at the clinic worked in the janitorial and housekeeping positions. At the time Mrs. Robbins applied for a position at the clinic there were no positions open; however, a job as record room clerk came open at the end of the month. Fourteen applicants, including Mrs. Robbins, were selected by Marilyn Pollard, the record room supervisor, for personal interviews. On February 3, 1978 Mrs. Robbins was personally interviewed for the record room clerk position by Mrs. Pollard. At trial Mrs. Pollard testified that when Mrs. Robbins appeared for the interview she was surprised to learn that she was black because in five years of interviewing she had never interviewed a black applicant. At the conclusion of the interview Mrs.

Robbins was advised that there were other applicants to interview and that she would be called later and told whether she had been selected. When she received no word for several days, Mrs. Robbins telephoned the clinic. Mrs. Pollard told her that another applicant had been selected and stated that Mrs. Robins had not been chosen because of her age. Shortly afterward, Mrs. Robbins called the clinic administrator who denied that the clinic had discriminated against her because of her age (which was thirty-seven). Mrs. Robbins then spoke with Mrs. Pollard again and accused her of discrimination. At this point Mrs. Pollard informed Mrs. Robbins that she had not been selected because of her personality. After this second telephone conversation, Mrs. Pollard made a notation on the margin of Mrs. Robbins' application: "Has a bad attitude—has called and asked many questions. She is a black girl. Could cause trouble. I don't need this one."

Mrs. Robbins filed a timely charge of discrimination against the clinic with the E.E.O.C. The E.E.O.C. failed to conclude its investigation within 180 days of filing; authorization was requested and received to file a civil suit in federal court. The instant action was filed on February 7, 1979.

II. Standard of Review

[1] The parties dispute the standard under which this court must review the trial court's finding of no discrimination, with defendant urging application of the clearly erroneous standard and plaintiff arguing for the exercise of independent review. Because a finding of discrimination *vel non* is an ultimate fact, we must make an independent determination of the allegations of discrimination. *Joshi v. Florida State University*, 646 F.2d 981, 986 (5th Cir. 1981); *Thompson v. Leland Police Department*,

633 F.2d 1111, 1112 (5th Cir. 1980). As we do so, however, we are bound by the trial court's credibility determinations and findings of subsidiary facts which are not themselves clearly erroneous, examining only whether there are sufficient subsidiary facts to support the district court's conclusion on the ultimate fact. *Joshi v. Florida State University*, 646 F.2d 981, 986 (5th Cir. 1981); *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of the State of Mississippi*, 637 F.2d 1014 (5th Cir. 1981); *Thompson v. Leland Police Department*, 633 F.2d 1111, 1112 (5th Cir. 1980); *East v. Romine*, 518 F.2d 332, 338-39 (5th Cir. 1975); *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975).

III. Burdens of Plaintiff and Defendant

The trial court having determined that defendant had met its burden of showing a nondiscriminatory reason and that plaintiff had not met her burden of proving pretext, we turn to the Supreme Court's pronouncements on the parties' respective burdens in a Title VII discriminatory treatment case. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established that initially the plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination.[1] Upon the plaintiff's success in proving a prima facie case, the defendant assumes the burden of articulating "some legitimate, nondiscriminatory reason for

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1. To establish a prima facie case of racial discrimination, the plaintiff must show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802, 93 S.Ct. at 1824. The defendant clinic in this case does not appeal from the trial court's ruling that Mrs. Robbins had sufficiently established her prima facie case.

the employee's rejection." *Id.* at 802, 93 S.Ct. at 1824. If the defendant carries this burden, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the reasons offered are in fact a pretext for discrimination. *Id.* at 804, 93 S.Ct. at 1825.

[2] Recently the Supreme Court expanded on the nature of the burden that shifts to the defendant once the plaintiff has made a prima facie case. The decision in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), altered the law in this circuit by placing on the defendant only a burden of producing a nondiscriminatory justification, not a burden of persuasion by a preponderance of the evidence, as this court had required. See *Ray v. Freeman,* 626 F.2d 439, 443 (5th Cir. 1980).

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. at ....., 101 S.Ct. at 1094 (footnotes omitted) (citation omitted). While lessening the burden to one of production, however, the Court also made clear that the sufficiency of the defendant's explanation must be evaluated by the extent to which it affords the plaintiff, through

the clarity and specificity of the proffered reasons, a full and fair opportunity to demonstrate pretext. *Id.* at ....., 101 S.Ct. at 1095-96.[2]

[3] At trial the defendant attempted to show that two job qualifications were relevant to the position of record room clerk: minimal typing skills and a personality well suited to cooperative work relations with coworkers in a small working environment. As to the first, neither plaintiff nor defendant disputes that both Mrs. Robbins and the applicant chosen possessed clerical skills exceeding the level required for the job. It is the second qualification—a pleasant personality—which defendant offered as its legitimate, nondiscriminatory reason for Mrs. Robbins' rejection. For the purposes of this case, we will assume the legitimacy of this factor as a job qualification. Before determining its legal sufficiency as a rebuttal to a prima facie case of discrimination, however, we must note the subjective nature not only of this qualification but also of the job selection process in this case.

The evidence shows, and the district court found, that the entire evaluation process was restricted to the job interview. Although the record room supervisor only made recommendations to the clinic's administrator on the basis of the supervisor's interviews of the applicants, the recommendations were routinely followed. No guidelines had been established for the interviews, nor had the administrator ever sat in on a full interview. Because of the

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2. *Burdine* also altered the law in this circuit in one other respect, which is not directly relevant to the issues in this appeal. The defendant no longer needs to prove that the applicant hired was better qualified than was plaintiff, *see Falcon v. General Telephone Company of the Southwest*, 626 F.2d 369, 378 (5th Cir. 1980), but only that the chosen applicant was equally well qualified and that the decision was not based upon unlawful criteria. 450 U.S. at ....., 101 S.Ct. at 1096-97.

interviewer's dominant influence in the selection process, therefore, the interviewer's impression of the applicant was crucial.

We have frequently noted the dangers involved in this sort of evaluation. "[S]ubjective selection processes involving white supervisors provide a ready mechanism for racial discrimination." *Johnson v. Uncle Ben's Inc.*, 628 F.2d 419, 426 (5th Cir. 1980). *Accord, Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1385 (5th Cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 345 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). The Supreme Court's requirement that "the defendant's explanation of its legitimate reasons . . . be clear and reasonably specific" provides the plaintiff with some protection against the potential for discrimination inherent in a subjective selection process involving subjective job criteria. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at ....., 101 S.Ct. at 1096. Obviously, the more subjective the qualification sought and the more subjective the manner in which it is measured, the more difficult will be the defendant's task in meeting the burden imposed by *Burdine*.

[4] With this in mind we review the evidence presented at trial by the defendant. The defect in Mrs. Robbins' personality—which was purportedly the basis for her rejection—was variously described as her "hostile," "intimidating," and "yucky" attitude. Although we refrain from holding either that this less than explicit account is by itself legally insufficient as an explanation or that a pleasant personality can never be a legitimate job criterion, we are compelled to conclude that the proffered reason is legally insufficient when viewed in the context of the

evidence in plaintiff's prima facie case and the testimony given by Mrs. Pollard on cross-examination. Succinctly put, we believe that this is one of those "cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Id.* at ....., n.10, 101 S.Ct. at 1095 n.10.

The initial evidence in this case showed that the defendant clinic's work force of approximately 75 employees was exclusively white, with the exception of its janitorial and housekeeping departments. Plaintiff further established that, although qualified, she was rejected and that the clinic continued interviewing applicants for the position after her rejection. It is the testimony of Mrs. Pollard on cross-examination, however, that adds a critical dimension to this evidence and to the description of Mrs. Robbins' personality failings. When defendant's attorney questioned Mrs. Pollard about black employees who had been hired after Mrs. Robbins' rejection,[3] the colloquy was as follows:

Q. What about Donna Richardson? Is she presently in your department?

A. Yes, and she's real jolly and fun to be with.

Q. And how does she relate to the other people in the department?

A. Well, she's more white than she is black. Does that answer your question?

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3. Evidence at trial revealed that, after charges of race discrimination were raised by Mrs. Robbins, the clinic adopted an affirmative action program. The clinic deviated from its normal hiring procedures in an effort to attract blacks to its clerical work force.

THE COURT: Well I'm not sure I understand what you mean. Is her race black?

A. Uh-huh.

THE COURT: But she's in your thinking, more white than she is black?

A. Yeah. She's, you know, she's—her father was military, right, so if you're military, well, you know, you're not a military man but if you've been in the military you're around a lot of black and white people. You go to school with a lot of whites, right, if you're in the military, especially overseas. My kids did.

THE COURT: But you make a distinction between white people and black people in your thinking, and she's more white than black?

A. Yes, she is.

THE COURT: What does that distinction mean between black people and white people, that she's more white?

A. Well, she's just, I think of her as being very normal, just, I mean, being just like—I feel like she's just a white person. I don't think of her—you're saying is she black or white. I'm saying as far as I'm concerned she's white.

As the above testimony reveals, Mrs. Pollard whose impression of the applicant was the controlling factor in the employment decision, had a tendency to equate pleasant personality characteristics, and particularly an ability to work well with others, with white people. The district judge's extensive questioning of Mrs. Pollard on this point reflects his justified concern with her remarks. In spite

of this apparent tendency and an explicit finding of fact that Mrs. Pollard possessed such a tendency, however, the trial judge concluded, on the basis of countervailing evidence of Mrs. Pollard's and her son's social relations with blacks, that "she possesses no racial bias or animus as such." We agree that the evidence supports these findings of subsidiary fact, but we believe that the district judge drew incorrect legal conclusions from them. Specifically, we disagree that the evidence supports the legal conclusion that racial bias played no part in the employment decision in this case.

We wish to emphasize that any findings of fact based upon a determination of Mrs. Pollard's credibility as a witness require the respect of this court unless clearly erroneous. Without discrediting Mrs. Pollard's testimony or ignoring the district judge's findings we may conclude nevertheless as part of our independent review of the finding of the ultimate fact of discrimination *vel non* that Mrs. Robbins' rejection was racially motivated or was the result of racial stereotyping.

While personality may be a legitimate job criterion, the presence or absence of a pleasant personality cannot be measured along racial lines. In light of her tendency to associate certain characteristics with race and her notation on the plaintiff's application,[4] Mrs. Pollard's rejection of plaintiff for the job clearly appears to have been influenced by racially oriented criteria. It is under the peculiar circumstances revealed by the initial evidence and by Mrs. Pollard's testimony in this case that we reject the trial court's decision.

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4. "Has a bad attitude—has called and asked many questions. *She is a black girl. Could cause trouble.* I don't need this one."

For these reasons, we hold that the evidence produced at trial indicates that the proffered explanation was pretextual. Accordingly, we reverse and direct that judgment be entered for plaintiff.

REVERSED and REMANDED.

SMITH, Judge, Sitting by Designation, dissenting:

I would affirm. While I agree with the majority that, in making an independent determination of the ultimate fact of discrimination *vel non*,

> we are bound by the trial court's credibility determinations and findings of subsidiary facts which are not themselves clearly erroneous, examining only whether there are sufficient subsidiary facts to support the district court's conclusion on the ultimate fact,

I respectfully disagree with the majority's conclusion that such support does not exist in the record. The subsidiary facts are more than adequate.

Because of the trial court's ruling at pretrial that plaintiff had established a prima facie case, defendant had from the outset of the trial the burden of proffering, through the introduction of admissible evidence, "some legitimate, nondiscriminatory reason for the employee's rejection."[1] Under the rule of the *McDonnell Douglas Corp.* case, defendant herein carried its burden of articulating, as a legitimate, nondiscriminatory requirement of the job, a personality well suited to cooperative work relations with coworkers in a small working environment and that it rejected Mrs. Robbins because the interviewer concluded that

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1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.E.2d 668 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, ..., 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

Mrs. Robbins did not possess this trait.[2] It was this proffered reason that plaintiff was required to discredit as a pretext for discrimination. The presumption raised by the prima facie case was rebutted by defendant's evidence, and discrimination then became an issue of fact which required plaintiff to establish that the articulated reason was not the true reason for her rejection.[3]

The record discloses that no element of race consideration existed during the interview or until the time Mrs. Robbins telephoned Mrs. Pollard about her application at a time when Mrs. Pollard was still involved in interviewing the 12 applicants. Her existing entry on the margin of Mrs. Robbins' application at that time was that the applicant was "so-so," and there is ample evidence in the record to establish that the reason for that adverse evaluation was Mrs. Robbins' personality as projected during a routine and thorough interview. Because of Mrs. Robbins' persistence, her age was given by Mrs. Pollard as a pretext, not to cover an illegal reason, but to avoid hurting Mrs. Robbins' feelings by discussing her perceived personality. Mrs. Pollard's notations including reference to Mrs. Robbins' calls, her race and the possibility that she "could cause trouble," were made after Mrs. Robbins had called the clinic three times, after she had been told of the personality evaluation, and after Mrs. Robbins accused Mrs. Pollard of discrimination and in fact threatened to file a complaint.

The record clearly establishes, and the trial judge found, that White-Wilson Medical Clinic, Inc., the *employer*, did not exclude black applicants, did not use an application containing any mention or clue as to race, and that Mrs.

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2. It is clear and admitted that plaintiff possessed the other requirement, qualification to perform clerical duties.

3. *Texas Dep't of Community Affairs v. Burdine, supra* note 1, 450 U.S. at ....., 101 S.Ct. at 1095.

Robbins was the first black applicant interviewed by Mrs. Pollard in five years, notwithstanding evidence that Mrs. Pollard did not act alone in screening the applications for interviews. Also, this and other evidence in the record discloses that defendant had a policy of nondiscrimination, communicated to its supervisors, that its administrator, prior to the incident involved here, favored hiring of additional black employees, and that he took immediate charge of the situation involving Mrs. Robbins in order to determine what had happened. Further, the record shows that the successful applicant for the vacant position was chosen on the basis of the two requirements stated, including a favorable view as to her personality. The same is true as to subsequent selection of a black employee who now works with Mrs. Pollard.

Mrs. Robbins could naturally suspect that race was a factor in the selection process because of the absence of black employees other than janitors and maids, and because of Mrs. Pollard's reference to age. Accordingly, she was entitled to a fair trial on the question whether defendant's failure to select her was based on racial bias. But defendant also was entitled to a fair trial and the record establishes that the trial was fair to both parties.

This court must certainly guard against a nibbling away of its record of firm and judicious efforts to support the elimination of illegal discrimination; but this case comes to us essentially as one involving standard of review, and not civil rights. This case is not an appropriate one for the court to use to emphasize its continuing vigilance in the latter area; not with these facts; not with these parties; not with an unfairly imposed penalty on this clinic.

This appeal is based primarily if not entirely on the issue of alleged racial bias or animus on the part of Mrs.

Pollard. The evidence does not support such a finding. This would not even be a close case were it not for Mrs. Pollard's outdated, unacceptable, sterotypical descriptions, and her ingenuous inability to recognize them as such. But Title VII is not intended to and in any event could not possibly eliminate all of the sterotypical expressions in an imperfect world; its purpose is to assure that the *reason* for denial is not bias or animus. Mrs. Pollard seems obviously incapable of speaking in language which meets the test of modern race-free expression; so much so that the trial judge personally examined her closely and in detail on the question of discrimination on the basis of bias and prejudice. Her full testimony clearly showed that she had none; therefore none can be imputed to defendant. Plaintiff had her day in court, and the trial judge exercised his duty of close scrutiny and found that race played no part in Mrs. Pollard's decision to reject her. On the facts of this record, we should not substitute a contrary belief for the conclusion of the judge who conducted the trial. His decision is supported by the evidence. It should not be reversed. I respectfully dissent.

(Filed May 8, 1980)

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION
PCA 79-0424

DELORES J. ROBBINS,
Plaintiff,

vs.

WHITE-WILSON MEDICAL CLINIC, INC.,
Defendant

MEMORANDUM DECISION

Plaintiff, a black woman, has brought this action under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e *et seq.* and 42 U.S.C. §1981, alleging defendant denied her employment on the basis of race. Defendant at all relevant times has been an employer within the scope of Title VII. Jurisdiction is vested in this court under 42 U.S.C. §2000e-5(f)(3).

As set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-07 (1973), the order and allocation of proof in a Title VII suit such as this is as follows:

1. the plaintiff must establish a prima facie case of race discrimination;

2. the employer then has the burden of proving, by a preponderance of the evidence, that a legitimate and nondiscriminatory reason existed to support its action; and

3. the plaintiff must then be afforded an opportunity to show that the employer's articulated reason was a pretext for discrimination.

Ultimately, the burden of persuasion rests on the plaintiff, who must establish the statutory violation by a preponderance of the evidence. *Whiting v. Jackson State University,* ..... F.2d ....., No. 78-1338 (5th Cir. 1980). Moreover, where, as here, "§1981 is used as a parallel basis for relief with §706 of Title VII against disparate treatment in employment, its elements appear to be identical to those of §706." *Whiting v. Jackson State University,* supra.

In order to establish a prima facie case, a plaintiff must show that she belongs to a protected minority, that she applied and was qualified for a job for which the employer was seeking applicants, was rejected, and, after her rejection, further applicants were sought. *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978). At the pretrial conference on December 18, 1979, the court granted plaintiff's motion for summary judgment to the extent that plaintiff had established a prima facie case of discrimination and thereby shifted the burden to the defendant to establish, at trial, a legitimate nondiscriminatory reason for rejecting plaintiff's application for employment.

The case was tried before the court on May 6, 1980. Having completed its review of the evidence presented at trial, briefs of counsel, and all other relevant material, and heard arguments of counsel, the court now finds that defendant has established a legitimate nondiscriminatory reason for not hiring plaintiff and that plaintiff has not met her burden of showing that the articulated reason was a pretext for discrimination. Accordingly, defendant is entitled to have judgment entered in its favor.

Much of the factual matter in this case is not in dispute. Plaintiff was one of 14 applicants interviewed for the position of record room clerk. She was the only black applicant. The interviews were conducted by Marilyn

Pollard, the record room supervisor. Ms. Pollard had the authority to evaluate the applicants and recommend her choice for the position to Theodore Rahe, defendant's administrator. Her recommendation was afforded great weight and was routinely approved. In this instance, Ms. Pollard recommended Ms. Vicki Kraftchick be hired and the recommendation was followed.

The evidence shows that the interviews are unstructured with no objective criteria, other than minimal clerical skills, applied. Ms. Pollard makes a purely subjective decision as to which applicant to hire. An important requirement in this regard, however, is that the individual selected must possess a good personality and attitude enabling the applicant to relate well to other employees working in a small, pressure-filled environment. The employee must not only be able to get along with her fellow record room clerks but must also be able to get along with doctors and nurses, who place great demands upon the staff.

Both plaintiff and Ms. Pollard testified that Ms. Pollard was surprised that plaintiff was black. As Ms. Pollard testified, plaintiff was the first black applicant she interviewed in five years. However, the absence of black applicants was not the result of any deliberate action by the defendant. Ms. Pollard did not select the people to be interviewed and all applications on file contained no mention or clue as to the applicant's race.

During the interview, Ms. Pollard advised plaintiff as to the requirements of the job. Ms. Pollard, from her standpoint, did not believe plaintiff had the type of personality that would enable her to work well on the job. According to Ms. Pollard, plaintiff was stern, did not smile, and left her feeling intimidated. Ms. Pollard did not believe that plaintiff had the type of personality that

would go over. At the close of the interview Ms. Pollard told plaintiff she would be back in touch. A couple of record room employees commented that plaintiff appeared "too serious" but Ms. Pollard does not base her recommendations in any way upon comments by any of the record room personnel.

Ms. Pollard continued to interview applicants for the position. She did not rule anyone out until she interviewed Vicki Kraftchick. After interviewing Ms. Kraftchick, Ms. Pollard decided she was the right person for the position. In Ms. Pollard's opinion Ms. Kraftchick had a very pleasing personality and appeared to relate well to others. Many of the applicants, including plaintiff and Ms. Kraftchick, had the basic clerical skills to be qualified for the job. However, Ms. Kraftchick was, in Ms. Pollard's opinion, the most qualified applicant because she possessed a vital, albeit intangible, asset - an outgoing personality that was well-suited to a high pressure job. According to Ms. Pollard, Ms. Kraftchick would have been hired if she were black and plaintiff would not have been hired if she were white.

When she did not hear further from Ms. Pollard, plaintiff called to find out if the position had been filled. Ms. Pollard first told plaintiff she had not been hired because of her age. She did so because she was flustered and did not want to tell plaintiff that she had not had a good interview. Subsequently, plaintiff was informed of the basis for Ms. Pollard's decision.

Resolution of this case necessarily hinges upon the testimony of Ms. Pollard. While the absence of any objective criteria for employee selection calls for close scrutiny of the employment process, it is also true that "standards that are suitable and practical for large organizations cannot be made a Procrustean bed for small

ones." *Jenkins v. Caddo-Bossier Association for Retarded Children*, 570 F.2d 1227, 1229 (5th Cir. 1978). Given the nature of the position at issue, a requirement that an applicant have the type of personality that enables her to relate well to others and remain pleasant under stress is a legitimate one. In determining that Ms. Kraftchick had a personality better suited for the job than plaintiff, and in hiring her on that basis, defendant has demonstrated a legitimate nondiscriminatory reason for not hiring plaintiff.

Plaintiff has not met her burden in showing that the articulated reason was a pretext for discrimination. Simply put, this court does not believe that race played any part in Ms. Pollard's decision. Because proper resolution of this case depends so much upon the determination whether this witness was motivated by racial bias or animus in rejecting plaintiff's application, she was questioned closely. She was examined at some length particularly concerning some statements suggestive of racial bias that she volunteered in answering questions.

The conclusion is reached from all of her testimony that she possesses no racial bias or animus as such and racial bias or animus played no part in rejection of plaintiff's application. It seems apparent from her testimony that she associates in her own mind certain personality characteristics as being more prevalent in the white than in the black race. But she has no bias or prejudice against the black race. To her people are people regardless of their race.

The conclusion that racial bias or animus played no part in her rejection of plaintiff's application is bolstered by the fact that blacks are socially welcome in her home and have been in her home in that capacity. It is also bolstered by the fact that her own young son has a close

black friend and the two children, from time to time, have spent the night with each other in each other's respective homes.

In addition, Ms. Kraftchick, the applicant selected for the position, testified in court. As noted, Ms. Pollard testified that she felt that a pleasing personality was of value in the somewhat strained environment in which those employed in the section of which she was supervisor had to work and to which she attached importance. On this court's observation of Ms. Kraftchick, it appeared to it as well that Ms. Kraftchick does indeed possess the kind of personality that Ms. Pollard testified she felt was so important.

It does not appear from a preponderance of the evidence that defendant has discriminated against plaintiff on account of her race. In this instance, however, the court also finds that plaintiff's claim was not frivolous, unreasonable, or groundless or that plaintiff continued to litigate it after it clearly became so. Thus, defendant is not entitled attorney's fees under 42 U.S.C. §2000e-5(k). *Lopez v. Arkansas County Independent School District*, 570 F.2d 241 (5th Cir. 1978). At post trial conference defendant agreed that under the factual situation here presented the defendant, if judgment were entered in its favor, could not recover attorney's fees, so that there was no need, in such event, for the court to reserve jurisdiction for the purpose of entertaining a motion for an award of such fees.

The clerk will enter judgment in favor of defendant and against plaintiff with this suit dismissed with prejudice and at plaintiff's cost.

DATED this 8th day of May, 1980.

/s/ Winston E. Arnow,
Winston E. Arnow, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

No. 80-5442

SUMMARY CALENDAR 8/6/81

D.C. Docket No. PCA 79-0424

DELORES J. ROBBINS,
Plaintiff-Appellant,

versus

WHITE-WILSON MEDICAL CLINIC, INC.,
Defendant-Appellee.

Appeal From the United States District for the
Northern District of Florida

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida; and argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded.

ISSUED AS MANDATE:

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*Former Fifth Circuit Case, (Section 9(1)) of Public Law 96-452—October 14, 1980.

(Filed May 8, 1980)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Civil Action File No. PCA 79-0424

DELORES J. ROBBINS,

vs.

WHITE-WILSON MEDICAL CLINIC, INC.

JUDGMENT

This action came on for trial before the Court, Honorable Winston E. Arnow, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, WHITE-WILSON MEDICAL CLINIC, INC., recover of the plaintiff, DELORES J. ROBBINS, its costs of action.

Dated at Pensacola, Florida, this 8th day of May, 1980.

Marvin S. Waits, Clerk
By: /s/ Clair A. Tomlin
Deputy Clerk of Court

Opposition

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1800

In the Supreme Court of the United States

October Term, 1981

WHITE-WILSON MEDICAL CLINIC, INC.,
Petitioner,

vs.

DELORES J. ROBBINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

JOSEPH L. HAMMONS
(Counsel of Record)
307 West Chase Street
Pensacola, Florida 32501
(904) 434-3595

WILLIAM D. WELLS
514 North Baylen Street
Pensacola, Florida 32501
(904) 433-5438

Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

WHETHER THE APPLICATION OF RULE OF FED. R. CIV. P. 52(a) IS IN ERROR WHERE THE APPEALS COURT, CONSIDERING A FINDING OF DISCRIMINATION *vel non* TO BE AN ULTIMATE FACT, MAKES AN INDEPENDENT DETERMINATION OF THE ALLEGATIONS OF DISCRIMINATION WHILE BEING BOUND BY THE TRIAL COURT'S CREDIBILITY DETERMINATIONS AND FINDINGS OF SUBSIDIARY FACTS WHICH ARE THEMSELVES NOT CLEARLY ERRONEOUS.

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No. 81-1800

In the Supreme Court of the United States

October Term, 1981

WHITE-WILSON MEDICAL CLINIC, INC.,
Petitioner,

vs.

DELORES J. ROBBINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

The respondent respectfully submits the following in opposition to the Petition for Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Fifth Circuit in *Robbins v. White-Wilson Medical Clinic, Inc.*, 660 F.2d 1064, entered November 12, 1981.

OPINIONS BELOW

The opinion of the district court is an unpublished decision and is reprinted in the appendix to this Response. The original opinion of the court of appeals is reported at 642 F.2d 153 (5th Cir. 1981), and is reprinted in the appendix to this Response. The original opinion constituting a unanimous reversal of the district court was with-

drawn by order of the Chief Judge of the Fifth Circuit when it was determined that one of the three panel judges, because of a perceived conflict, should have recused himself. The case was ordered submitted as to an entirely new panel for consideration without reference to the withdrawn original decision. Order of withdrawal reported 645 F.2d 252. The second opinion of the court of appeals ordering reversal of the district court is reported at 660 F.2d 1064, and is reprinted in the appendix to this Response.

JURISDICTION

There is no dispute with petitioner's allocation of the basis for jurisdiction.

STATUTES AND RULE INVOLVED

There is no disagreement with petitioner's statement of Statutes and Rule involved.

STATEMENT OF THE CASE

A. Factual Background.

Petitioner's "statement" is accurate but additional factual background may benefit the Court in consideration of the Petition.

The Defendant Clinic, petitioner herein, is located in Ft. Walton Beach, Florida. The clinic maintains about seventy-five employees while providing outpatient services to residents of northwest Florida and southern Alabama. Prior to the filing of Mrs. Robbins' EEOC charge, the only black employees at the clinic worked in janitorial and housekeeping positions. (App. A4).

The selection of the fourteen applicants for the position of record room clerk by the record room supervisor, Marilyn Pollard, for personal interview was effected through review of paper qualifications as reflected on the completed application form. The completed application forms had been previously filed through mail or by leaving at a designated area at the clinic. It was not apparent from the application forms that a black person was among the fourteen people scheduled for personal interviews. Mrs. Pollard did not know she had selected a black applicant for personal interview until seeing Mrs. Robbins at the time of the interview.

The interviewing process for selecting new employees at the Defendant Clinic was unstructured with no objective criteria, other than minimal typing skills, required. Mrs. Pollard made purely subjective decisions as to which applicant to hire. (App A19). Mrs. Pollard's decisions regarding hiring were routinely approved by the clinic administrator.

Mrs. Robbins, after her interview, was advised she would be contacted by the clinic with regard as to whether she were to be hired for the subject position. She was to be contacted within a few days. Not having received a call from the clinic, Mrs. Robbins contacted the clinic inquiring about the filling of the position. Mrs. Pollard first advised Mrs. Robbins that she had been rejected for the position because of her age. Mrs. Robbins was later told by Mrs. Pollard that the rejection was due to her personality. (App. A5).

B. The District Court's Opinion.

Petitioner's "statement" is accurate, however, additional uncontroverted background information may be helpful in the Court's consideration of the Petition.

Prior to trial the district court granted plaintiff's Motion for Summary Judgment to the extent the Court concluded there existed no issue respecting any material fact insofar as the test provided by *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973). The Court thus concluded that the plaintiff had established a prima facie case of employment discrimination.

After trial the Court issued judgment in favor of the Defendant Clinic. In its order the district court noted much of the factual matter presented at trial was not in dispute. The interviews were conducted by Marilyn Pollard, the record room supervisor. Mrs. Pollard had the authority to evaluate applicants and recommended her choice to the clinic administrator for confirmation. Her recommendations were afforded great weight and were routinely approved. (App. A19).

The district court found the evidence showed the interviews were totally unstructured with no objective criteria applied other than the minimal typing skills. The district court noted that Mrs. Pollard makes a purely subjective decision as to which applicant to hire. The district court concluded that Mrs. Pollard, after interviewing the plaintiff, did not believe Mrs. Robbins had the type of personality that would "go over". (App. A20). The district court determined the requirement of a "pleasant personality" to be legitimate for the position in question. The position in question was that of record room clerk.

The district court also found from Mrs. Pollard's testimony that "she associates in her own mind certain personality characteristics as being more prevalent in the white than in the black race". In conjunction, the district court concluded, "But she has no bias or prejudice against the black race". (App. A21).

The district court finally concluded:

"It does not appear from a preponderance of the evidence that defendant has discriminated against plaintiff on account of her race. In this instance, however, the court also finds that plaintiff's claim was not frivolous, unreasonable, or groundless or that plaintiff continued to litigate after it clearly became so." (App. A22).

C. The Court of Appeals' Decision.

The Fifth Circuit Court of Appeals reversed the district court decision of judgment in favor of the Defendant Clinic. Judge James C. Hill, joined by Judge Albert S. Henderson spoke for the majority while Judge Edward S. Smith, sitting by designation from the Court of Claims, dissented.

The court of appeals panel initially noted that:

"Because a finding of discrimination *vel non* is an ultimate fact, we must make an independent determination of the allegations of discrimination. *Joshi v. Florida State University*, 646 F.2d 981, 986 (5th Cir. 1981); *Thompson v. Leland Police Department*, 633 F.2d 1111, 1112 (5th Cir. 1980). As we do so, however, we are bound by the trial court's credibility determinations and findings of subsidiary facts which are not themselves clearly erroneous, examining only whether there are sufficient subsidiary facts to support the district court's conclusion on the ultimate fact. *Joshi v. Florida State University*, 646 F.2d 981, 986 (5th Cir. 1981); *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of the State of Mississippi*, 637 F.2d 1014 (5th Cir. 1981); *Thompson v. Leland Police Department*, 633 F.2d 1111,

1112 (5th Cir. 1980); *East v. Romine*, 518 F.2d 332, 338-39 (5th Cir. 1975); *Causey v. Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975)." (App. A5 & 6).

In addressing the issues of the appeal the court of appeals panel recognized the recent decision of the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981), which altered the law in the Fifth Circuit by placing on the defendant only a burden of producing a non-discriminatory justification, not a burden of persuasion by a preponderence of the evidence, as the Fifth Circuit had previously required. The panel noted that in *Burdine*, while lessening the burden to one of production, the Supreme Court made it clear that the sufficiency of the defendant's explanation must be evaluated by the extent to which it affords the plaintiff, through the clarity and specificity of the proffered reason, a full and fair opportunity to demonstrate pretext. (App. A8).

The Defendant Clinic, at trial, had offered as its legitimate, non-discriminatory reason for rejecting Mrs. Robbins, the job qualification of a "pleasant personality". (App. A8). The court of appeals panel therefore noted that before determining its legal sufficiency as a rebuttal to a prima facie case of discrimination that the court must "note the subjective nature not only of this qualification, but also of the job selection process in this case". (App. A8).

In this regard the panel noted that in *Burdine*, the Supreme Court required that "the defendant's explanation of its legitimate reasons . . . be clear and reasonably specific", and that this requirement provides the plaintiff with some protection against the potential for discrimination inherent in a subjective selection process involving subjective job criteria. The panel then went on to state:

> "Obviously, the more subjective the qualifications sought and the more subjective the manner in which it is measured, the more difficult will be the defendant's task in meeting the burden imposed by *Burdine*." (App. A9).

The initial evidence showed the defendant's work force of approximately seventy-five employees was exclusively white, with the exception of its janitorial and housekeeping departments. The court of appeals panel then noted:

> "It is the testimony of Mrs. Pollard on cross-examination, however, that adds a critical dimension to this evidence and to the description of Mrs. Robbins' personality failings." (App. A10).

The panel opinion then went on to quote at length from the testimony of Mrs. Pollard on cross-examination. One portion of that testimony as reflected in the panel opinion is as follows:

> "THE COURT: But you make a distinction between white people and black people in your thinking, and she's more white than black?
>
> A. Yes, she is.
>
> THE COURT: What does that distinction mean between black people and white people, that she's more white?
>
> A. Well, she's just, I think of her as being very normal, just, I mean, being just like - I feel like she's just a white person. I don't think of her - you're saying is she black or white. I'm saying as far as I'm concerned she's white." (App. A11).

In explaining its decision to reverse the district court's legal conclusion that race played no part in the rejection of Mrs. Robbins, the court of appeals panel stated:

> "We wish to emphasize that any findings of fact based upon a determination of Mrs. Pollard's credibility as a witness require the respect of this court unless clearly erroneous. Without discrediting Mrs. Pollard's testimony or ignoring the district judge's findings we may conclude nevertheless as a part of our independent review of the finding of the ultimate fact of discrimination *vel non* that Mrs. Robbins' rejection was racially motivated or was the result of racial stereotyping.
>
> While personality may be a legitimate job criterion, the presence or absence of a pleasant personality cannot be measured along racial lines. In light of her tendency to associate certain characteristics with race and her notation on the plaintiff's application,[1] Mrs. Pollard's rejection of plaintiff for the job clearly appears to have been influenced by racially oriented criteria. It is under the peculiar circumstances revealed by the initial evidence and by Mrs. Pollard's testimony in this case that we reject the trial court's decision." (App. A12).

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1. "Has a bad attitude - has called and asked many questions. *She is a black girl. Could cause trouble.* I don't need this one."

REASONS FOR DENYING THE WRIT

Introduction

Petitioner noted initially in its argument what it perceives to be six subsidiary fact determinations of the district court. The petitioner then concluded that "it seems almost impossible to have extrapolated from the subsidiary findings an ultimate finding of discriminatory purpose at variance with that of the district court." (Petition, page 10). Petitioner then noted that it was the credibility of witnesses upon which the "ultimate findings of fact" rest. Petitioner's argument is irrelevant in that neither the findings of subsidiary fact nor the credibility of trial witnesses were questioned or challenged by the decision of the court of appeals panel reversing the trial court. The issue is clearly, given largely undisputed factual background and accepting the district court's findings of subsidiary fact, did the district court draw an incorrect legal conclusion as the basis for its decision.

The court of appeals panel also had before it additional and critically important subsidiary facts as determined by the district court. Since petitioner, in its argument, has already listed six subsidiary facts, your respondent will list the omitted subsidiary facts in the numbered sequence to petitioner's listing:

(7) The employment interviews are unstructured with no objective criteria, other than minimal clerical skills.

(8) Mrs. Pollard, the record room supervisor, made a purely subjective decision as to which applicant to hire using a pleasant personality as the criterion.

(9) Mrs. Pollard associates in her own mind certain personality characteristics as being more prevalent in the white race than in the black race.

The basis for the district court's subsidiary finding that Mrs. Pollard's view of people is colored by racial stereotyping is found through her own testimony at trial. This testimony, making the record in the case unique, was quoted in the court of appeals' opinion and may be read in its entirety in that opinion attached to this brief. (App. A10).

The district court decision noted that the above-referenced testimony of Mrs. Pollard revealed that she, as the person making the controlling employment decision, tends to equate pleasant personality characteristics and particularly an ability to work well with others, with white people. The district court concluded through other testimony of Mrs. Pollard that "she possesses no racial bias or animus as such". The court of appeals agreed the evidence supported both the findings of subsidiary fact of racial stereotyping by Mrs. Pollard and that she has "no racial bias or animus as such". What the court of appeals disagreed with was not these findings of subsidiary fact, but the legal conclusion of the trial court that race played no part in the employment decision in this case. (App. A12).

The court of appeals stated the basis of its decision at the close of its written opinion:

> "While personality may be a legitimate job criterion, the presence or absence of a pleasant personality cannot be measured along racial lines. In light of her tendency to associate certain characteristics with race and her notation on the plaintiff's application,[1] Mrs. Pollard's rejection of plaintiff for the job clearly ap-

pears to have been influenced by racially oriented criteria. It is under the peculiar circumstances revealed by the initial evidence and by Mrs. Pollard's testimony in this case that we reject the trial court's decision." (App. A12).

Whether the Decision Below Conflicts With Decisions of Other Circuits in Its Holding That a Court of Appeals May "Independently Determine" the Existence of Discriminatory Purpose Free of the Strictures of Rule 52(a).

The Petition goes on to argue that the decision in this simple individual case of employment discrimination constitutes some form of "appellate activism" symptomatic of "general disregard by the Fifth Circuit for the proper allocation of responsibilities between district courts and courts of appeal in determining the existence of non-existence of discriminatory purpose in Title VII cases". (Petition, page 11).

The Petition alludes to *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), *cert. granted*, 101 S.Ct. 1972 (1981), for the proposition that this court already has under consideration the Rule 52(a) issue of appellate review of a trial court's finding of the ultimate fact of discrimination. However, the issue of discriminatory purpose or motive as raised in *Swint* bears no resemblance to the issue of review in the instant case. It is true the issues on review in *Swint* include a question of Rule 52 application yet, in *Swint*, the complex determination of discriminatory purpose in the creation of a labor union seniority system as addressed in *Teamsters v. United States*, 431 U.S. 324 (1977), within the meaning of §703(h) of Title VII bears no relation to the distinct legal conclusions reached by the court of appeals in the instant case.

The Fifth Circuit has utilized the application of Rule 52(a) challenged in the instant case for several years. *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975); *Humphrey v. Southwestern Porcelain Cement Company*, 488 F.2d 691, 694 (1974). The genesis for this consistent application of the clearly erroneous standard is found in *Baumgartner v. United States*, 322 U.S. 665, 671 (1944), 64 S.Ct. 1240, 1244, 88 L.Ed. page 1525, 1529, where this Court stated:

> "Finding so-called ultimate 'facts' more clearly implies the application of standards of law. . . Though labeled 'finding of fact', it may involve the very basis on which the judgment of fallible evidence is to be made." 322 U.S. at 671.

This application of the clearly erroneous standard is based on logic and common sense and is otherwise totally consistent with the requirements of the Rule.

An example of the proper application of Rule 52 is found in *Christopher v. State of Iowa*, 559 F.2d 1135 (8th Cir. 1977), where the court of appeals noted that acceptance of the trial court's findings of fact does not require the appeals court to apply the clearly erroneous standard in testing whether conclusions drawn from the found facts are in accordance with established law. "The scope of the clearly erroneous standard does not preclude such inquiry". 559 F.2d at 1138.

Clearly, a court of appeals is not in as good a position as the district court to make credibility determinations or findings of primary fact and thus should not alter those fact findings unless they are clearly erroneous. However, upon accepting the trial court's credibility determination and primary factual determination the appellate court is in a position to independently examine the ultimate fact and legal conclusion drawn by the trial court. This procedure

insures deference to the trial court in those areas where its perspective is direct yet preserves for review, in the proper case, the legal effect of the primary facts as they were determined to exist by the trial court. This approach is necessary, functional, and totally consistent with Rule 52(a).

It was the trial court, in the instant case, that determined the primary fact that though Mrs. Pollard possesses no racial animus or bias as such, that she does practice racial stereotyping with regard to personality characteristics. It was the trial court that determined that personality was the criterion for selection to the position in question. The credibility of Mrs. Pollard and the determination of these critical primary facts have not been altered in any respect by the court of appeals' decision. It was the ultimate fact of discrimination as prohibited by Title VII that was addressed on appeal. It was the legal conclusion of the trial court finding no violation of Title VII that was reversed.

Respondent submits strenuously that the application of Rule 52(a) in this case is totally consistent with the practical implementation and intent of the rule.

Even assuming, *arguendo*, the Fifth Circuit application of Rule 52(a) is subject to legal doubt this particular case would serve as an inappropriate vehicle for addressing the issue. This case involves a single plaintiff alleging discrimination against an employer of approximately seventy-five people who maintained an exclusively white workforce with the exception of janitors and maids. The supervisor admittedly had the authority and made the decision to reject an otherwise qualified black applicant on grounds of personality of the most subjective measure (pleasant) in a totally unstructured and subjective selection process. Even

more significantly we have the same supervisor testifying at the trial as to her concept of racial normalcy based on what she believes to be white personality characteristics.

The "peculiar circumstances" as noted by the appeals court panel make this case a paritcularly inappropriate vehicle for addressing the application of Rule 52(a).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH L. HAMMONS
307 West Chase Street
Pensacola, Florida 32501

PROOF OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April, 1982, three copies of the Respondent's Brief in Opposition to the Petition in the case of White-Wilson Medical Clinic, Inc. vs. Delores J. Robbins were mailed, first-class postage prepaid to Peter W. Zinober, Esquire, P. O. Box 3239, Tampa, Florida 33601, Counsel for Petitioner. I further certify that all parties required to be served have been served.

JOSEPH L. HAMMONS
307 West Chase Street
Pensacola, Florida 32501
(904) 434-3595
Counsel for Respondent

Appendix

APPENDIX

Delores J. ROBBINS,
Plaintiff-Appellant,

v.

WHITE-WILSON MEDICAL CLINIC, INC., Defendant-Appellee.

No. 80-5442.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 12, 1981.

A black female brought suit under the equal employment opportunity provisions of the Civil Rights Act of 1964 and equal rights statute but the United States District Court for the Northern District of Florida, at Pensacola, Winston E. Arnow, J., ultimately entered judgment for the defendant employer. Plaintiff appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that in view of evidence indicating that employer's job qualifications were subjective, including requirement of "pleasant" personality and evidence indicating that employer's interviewer, whose impression of applicant was controlling factor in decision not to hire, had tendency to equate pleasant personality characteristics, and particularly ability to work well with others, with white people, case was one of those where plaintiff's initial evidence, combined with effective cross-

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

examination of defendant, sufficed to discredit defendant employer's explanation for not hiring plaintiff.

Reversed and remanded.

Smith, J., sitting by designation, dissented and filed opinion.

1. Federal Courts (Key) 755, 858

Because finding of discrimination vel non is ultimate fact, Court of Appeals must make independent determination of allegations of discrimination in equal employment opportunity suit under Civil Rights Act of 1964 and equal rights statute but Court of Appeals is bound by trial court's credibility determinations and findings of subsidiary facts which are not themselves clearly erroneous, examining only whether there are sufficient subsidiary facts to support district court's conclusion on ultimate fact. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

2. Civil Rights (Key) 44(1)

Once plaintiff has made proper prima facie case out of racial discrimination in equal employment opportunity case, defendant has only burden of producing nondiscriminatory justification, not burden of persuasion, by preponderance of evidence, but though burden has been lessened to one of production rather than persuasion, sufficiency of employer's explanation must be evaluated by extent to which it affords plaintiff, through clarity and specificity of proper reasons, full and fair opportunity to demonstrate pretext. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

3. Civil Rights (Key) 44(1)

The more subjective the employment qualification sought and the more subjective the manner in which it is measured, the more difficult will be defendant employer's task, in equal employment opportunity suit, of meeting prima facie case by producing nondiscriminatory justification. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

4. Civil Rights (Key) 44(1)

In view of evidence indicating that employer's job qualifications were subjective, including requirement of "pleasant" personality and evidence indicating that employer's interviewer, whose impression of applicant was controlling factor in decision not to hire, had tendency to equate pleasant personality characteristics, and particularly ability to work well with others, with white people, case was one of those where plaintiff's initial evidence, combined with effective cross-examination of defendant, sufficed to discredit defendant employer's explanation for not hiring plaintiff. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

Appeal from the United States District Court for the Northern District of Florida.

Before HILL, Circuit Judge, SMITH**, Judge, and HENDERSON, Circuit Judge.

JAMES C. HILL, Circuit Judge:

Plaintiff, a black female, brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. § 1981, alleging that the defendant clinic denied

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**Judge U.S. Court of Claims sitting by designation.

her employment on the basis of race. The district court granted plaintiff's motion for summary judgment to the extent that plaintiff had established the necessary elements of a prima facie case of employment discrimination set forth in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Following a non-jury trial, however, the judge concluded that the defendant had established a legitimate, nondiscriminatory reason for refusing to hire plaintiff and that plaintiff had failed to prove by a preponderance of the evidence that the articulated reason was a pretext for discrimination. Accordingly, the district court entered judgment for defendant. We now reverse.

I. Facts

Early in January 1978, Mrs. Robbins submitted an application for employment to the White-Wilson Medical Clinic, a privately owned medical clinic located in Fort Walton Beach, Florida that provides out-patient services to residents of northwest Florida and southern Alabama. Prior to the filing of Mrs. Robbins' E.E.O.C. charge, the only black employees at the clinic worked in the janitorial and housekeeping positions. At the time Mrs. Robbins applied for a position at the clinic there were no positions open; however, a job as record room clerk came open at the end of the month. Fourteen applicants, including Mrs. Robbins, were selected by Marilyn Pollard, the record room supervisor, for personal interviews. On February 3, 1978 Mrs. Robbins was personally interviewed for the record room clerk position by Mrs. Pollard. At trial Mrs. Pollard testified that when Mrs. Robbins appeared for the interview she was surprised to learn that she was black because in five years of interviewing she had never interviewed a black applicant. At the conclusion of the interview Mrs.

Robbins was advised that there were other applicants to interview and that she would be called later and told whether she had been selected. When she received no word for several days, Mrs. Robbins telephoned the clinic. Mrs. Pollard told her that another applicant had been selected and stated that Mrs. Robins had not been chosen because of her age. Shortly afterward, Mrs. Robbins called the clinic administrator who denied that the clinic had discriminated against her because of her age (which was thirty-seven). Mrs. Robbins then spoke with Mrs. Pollard again and accused her of discrimination. At this point Mrs. Pollard informed Mrs. Robbins that she had not been selected because of her personality. After this second telephone conversation, Mrs. Pollard made a notation on the margin of Mrs. Robbins' application: "Has a bad attitude—has called and asked many questions. She is a black girl. Could cause trouble. I don't need this one."

Mrs. Robbins filed a timely charge of discrimination against the clinic with the E.E.O.C. The E.E.O.C. failed to conclude its investigation within 180 days of filing; authorization was requested and received to file a civil suit in federal court. The instant action was filed on February 7, 1979.

II. Standard of Review

[1] The parties dispute the standard under which this court must review the trial court's finding of no discrimination, with defendant urging application of the clearly erroneous standard and plaintiff arguing for the exercise of independent review. Because a finding of discrimination *vel non* is an ultimate fact, we must make an independent determination of the allegations of discrimination. *Joshi v. Florida State University*, 646 F.2d 981, 986 (5th Cir. 1981); *Thompson v. Leland Police Department*,

633 F.2d 1111, 1112 (5th Cir. 1980). As we do so, however, we are bound by the trial court's credibility determinations and findings of subsidiary facts which are not themselves clearly erroneous, examining only whether there are sufficient subsidiary facts to support the district court's conclusion on the ultimate fact. *Joshi v. Florida State University*, 646 F.2d 981, 986 (5th Cir. 1981); *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of the State of Mississippi*, 637 F.2d 1014 (5th Cir. 1981); *Thompson v. Leland Police Department*, 633 F.2d 1111, 1112 (5th Cir. 1980); *East v. Romine*, 518 F.2d 332, 338-39 (5th Cir. 1975); *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975).

III. Burdens of Plaintiff and Defendant

The trial court having determined that defendant had met its burden of showing a nondiscriminatory reason and that plaintiff had not met her burden of proving pretext, we turn to the Supreme Court's pronouncements on the parties' respective burdens in a Title VII discriminatory treatment case. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established that initially the plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination.[1] Upon the plaintiff's success in proving a prima facie case, the defendant assumes the burden of articulating "some legitimate, nondiscriminatory reason for

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1. To establish a prima facie case of racial discrimination, the plaintiff must show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802, 93 S.Ct. at 1824. The defendant clinic in this case does not appeal from the trial court's ruling that Mrs. Robbins had sufficiently established her prima facie case.

the employee's rejection." *Id.* at 802, 93 S.Ct. at 1824. If the defendant carries this burden, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the reasons offered are in fact a pretext for discrimination. *Id.* at 804, 93 S.Ct. at 1825.

[2] Recently the Supreme Court expanded on the nature of the burden that shifts to the defendant once the plaintiff has made a prima facie case. The decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), altered the law in this circuit by placing on the defendant only a burden of producing a nondiscriminatory justification, not a burden of persuasion by a preponderance of the evidence, as this court had required. See *Ray v. Freeman*, 626 F.2d 439, 443 (5th Cir. 1980).

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. at ....., 101 S.Ct. at 1094 (footnotes omitted) (citation omitted). While lessening the burden to one of production, however, the Court also made clear that the sufficiency of the defendant's explanation must be evaluated by the extent to which it affords the plaintiff, through

the clarity and specificity of the proffered reasons, a full and fair opportunity to demonstrate pretext. *Id.* at ....., 101 S.Ct. at 1095-96.[2]

[3] At trial the defendant attempted to show that two job qualifications were relevant to the position of record room clerk: minimal typing skills and a personality well suited to cooperative work relations with coworkers in a small working environment. As to the first, neither plaintiff nor defendant disputes that both Mrs. Robbins and the applicant chosen possessed clerical skills exceeding the level required for the job. It is the second qualification—a pleasant personality—which defendant offered as its legitimate, nondiscriminatory reason for Mrs. Robbins' rejection. For the purposes of this case, we will assume the legitimacy of this factor as a job qualification. Before determining its legal sufficiency as a rebuttal to a prima facie case of discrimination, however, we must note the subjective nature not only of this qualification but also of the job selection process in this case.

The evidence shows, and the district court found, that the entire evaluation process was restricted to the job interview. Although the record room supervisor only made recommendations to the clinic's administrator on the basis of the supervisor's interviews of the applicants, the recommendations were routinely followed. No guidelines had been established for the interviews, nor had the administrator ever sat in on a full interview. Because of the

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2. *Burdine* also altered the law in this circuit in one other respect, which is not directly relevant to the issues in this appeal. The defendant no longer needs to prove that the applicant hired was better qualified than was plaintiff, *see Falcon v. General Telephone Company of the Southwest*, 626 F.2d 369, 378 (5th Cir. 1980), but only that the chosen applicant was equally well qualified and that the decision was not based upon unlawful criteria. 450 U.S. at ....., 101 S.Ct. at 1096-97.

interviewer's dominant influence in the selection process, therefore, the interviewer's impression of the applicant was crucial.

We have frequently noted the dangers involved in this sort of evaluation. "[S]ubjective selection processes involving white supervisors provide a ready mechanism for racial discrimination." *Johnson v. Uncle Ben's Inc.*, 628 F.2d 419, 426 (5th Cir. 1980). *Accord, Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1385 (5th Cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 345 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). The Supreme Court's requirement that "the defendant's explanation of its legitimate reasons . . . be clear and reasonably specific" provides the plaintiff with some protection against the potential for discrimination inherent in a subjective selection process involving subjective job criteria. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at ....., 101 S.Ct. at 1096. Obviously, the more subjective the qualification sought and the more subjective the manner in which it is measured, the more difficult will be the defendant's task in meeting the burden imposed by *Burdine*.

[4] With this in mind we review the evidence presented at trial by the defendant. The defect in Mrs. Robbins' personality—which was purportedly the basis for her rejection—was variously described as her "hostile," "intimidating," and "yucky" attitude. Although we refrain from holding either that this less than explicit account is by itself legally insufficient as an explanation or that a pleasant personality can never be a legitimate job criterion, we are compelled to conclude that the proffered reason is legally insufficient when viewed in the context of the

evidence in plaintiff's prima facie case and the testimony given by Mrs. Pollard on cross-examination. Succinctly put, we believe that this is one of those "cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Id.* at ....., n.10, 101 S.Ct. at 1095 n.10.

The initial evidence in this case showed that the defendant clinic's work force of approximately 75 employees was exclusively white, with the exception of its janitorial and housekeeping departments. Plaintiff further established that, although qualified, she was rejected and that the clinic continued interviewing applicants for the position after her rejection. It is the testimony of Mrs. Pollard on cross-examination, however, that adds a critical dimension to this evidence and to the description of Mrs. Robbins' personality failings. When defendant's attorney questioned Mrs. Pollard about black employees who had been hired after Mrs. Robbins' rejection,[3] the colloquy was as follows:

Q. What about Donna Richardson? Is she presently in your department?

A. Yes, and she's real jolly and fun to be with.

Q. And how does she relate to the other people in the department?

A. Well, she's more white than she is black. Does that answer your question?

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3. Evidence at trial revealed that, after charges of race discrimination were raised by Mrs. Robbins, the clinic adopted an affirmative action program. The clinic deviated from its normal hiring procedures in an effort to attract blacks to its clerical work force.

THE COURT: Well I'm not sure I understand what you mean. Is her race black?

A. Uh-huh.

THE COURT: But she's in your thinking, more white than she is black?

A. Yeah. She's, you know, she's—her father was military, right, so if you're military, well, you know, you're not a military man but if you've been in the military you're around a lot of black and white people. You go to school with a lot of whites, right, if you're in the military, especially overseas. My kids did.

THE COURT: But you make a distinction between white people and black people in your thinking, and she's more white than black?

A. Yes, she is.

THE COURT: What does that distinction mean between black people and white people, that she's more white?

A. Well, she's just, I think of her as being very normal, just, I mean, being just like—I feel like she's just a white person. I don't think of her—you're saying is she black or white. I'm saying as far as I'm concerned she's white.

As the above testimony reveals, Mrs. Pollard whose impression of the applicant was the controlling factor in the employment decision, had a tendency to equate pleasant personality characteristics, and particularly an ability to work well with others, with white people. The district judge's extensive questioning of Mrs. Pollard on this point reflects his justified concern with her remarks. In spite

of this apparent tendency and an explicit finding of fact that Mrs. Pollard possessed such a tendency, however, the trial judge concluded, on the basis of countervailing evidence of Mrs. Pollard's and her son's social relations with blacks, that "she possesses no racial bias or animus as such." We agree that the evidence supports these findings of subsidiary fact, but we believe that the district judge drew incorrect legal conclusions from them. Specifically, we disagree that the evidence supports the legal conclusion that racial bias played no part in the employment decision in this case.

We wish to emphasize that any findings of fact based upon a determination of Mrs. Pollard's credibility as a witness require the respect of this court unless clearly erroneous. Without discrediting Mrs. Pollard's testimony or ignoring the district judge's findings we may conclude nevertheless as part of our independent review of the finding of the ultimate fact of discrimination *vel non* that Mrs. Robbins' rejection was racially motivated or was the result of racial stereotyping.

While personality may be a legitimate job criterion, the presence or absence of a pleasant personality cannot be measured along racial lines. In light of her tendency to associate certain characteristics with race and her notation on the plaintiff's application,[4] Mrs. Pollard's rejection of plaintiff for the job clearly appears to have been influenced by racially oriented criteria. It is under the peculiar circumstances revealed by the initial evidence and by Mrs. Pollard's testimony in this case that we reject the trial court's decision.

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4. "Has a bad attitude—has called and asked many questions. *She is a bl[illegible] girl. Could cause trouble.* I don't need this one."

For these reasons, we hold that the evidence produced at trial indicates that the proffered explanation was pretextual. Accordingly, we reverse and direct that judgment be entered for plaintiff.

REVERSED and REMANDED.

SMITH, Judge, Sitting by Designation, dissenting:

I would affirm. While I agree with the majority that, in making an independent determination of the ultimate fact of discrimination *vel non*,

> we are bound by the trial court's credibility determinations and findings of subsidiary facts which are not themselves clearly erroneous, examining only whether there are sufficient subsidiary facts to support the district court's conclusion on the ultimate fact,

I respectfully disagree with the majority's conclusion that such support does not exist in the record. The subsidiary facts are more than adequate.

Because of the trial court's ruling at pretrial that plaintiff had established a prima facie case, defendant had from the outset of the trial the burden of proffering, through the introduction of admissible evidence, "some legitimate, nondiscriminatory reason for the employee's rejection."[1] Under the rule of the *McDonnell Douglas Corp.* case, defendant herein carried its burden of articulating, as a legitimate, nondiscriminatory requirement of the job, a personality well suited to cooperative work relations with coworkers in a small working environment and that it rejected Mrs. Robbins because the interviewer concluded that

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1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, , 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

Mrs. Robbins did not possess this trait.[2] It was this proffered reason that plaintiff was required to discredit as a pretext for discrimination. The presumption raised by the prima facie case was rebutted by defendant's evidence, and discrimination then became an issue of fact which required plaintiff to establish that the articulated reason was not the true reason for her rejection.[3]

The record discloses that no element of race consideration existed during the interview or until the time Mrs. Robbins telephoned Mrs. Pollard about her application at a time when Mrs. Pollard was still involved in interviewing the 12 applicants. Her existing entry on the margin of Mrs. Robbins' application at that time was that the applicant was "so-so," and there is ample evidence in the record to establish that the reason for that adverse evaluation was Mrs. Robbins' personality as projected during a routine and thorough interview. Because of Mrs. Robbins' persistence, her age was given by Mrs. Pollard as a pretext, not to cover an illegal reason, but to avoid hurting Mrs. Robbins' feelings by discussing her perceived personality. Mrs. Pollard's notations including reference to Mrs. Robbins' calls, her race and the possibility that she "could cause trouble," were made after Mrs. Robbins had called the clinic three times, after she had been told of the personality evaluation, and after Mrs. Robbins accused Mrs. Pollard of discrimination and in fact threatened to file a complaint.

The record clearly establishes, and the trial judge found, that White-Wilson Medical Clinic, Inc., the *employer*, did not exclude black applicants, did not use an application containing any mention or clue as to race, and that Mrs.

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2. It is clear and admitted that plaintiff possessed the other requirement, qualification to perform clerical duties.

3. *Texas Dep't of Community Affairs v. Burdine*, *supra* note 1, 450 U.S. at ....., 101 S.Ct. at 1095.

Robbins was the first black applicant interviewed by Mrs. Pollard in five years, notwithstanding evidence that Mrs. Pollard did not act alone in screening the applications for interviews. Also, this and other evidence in the record discloses that defendant had a policy of nondiscrimination, communicated to its supervisors, that its administrator, prior to the incident involved here, favored hiring of additional black employees, and that he took immediate charge of the situation involving Mrs. Robbins in order to determine what had happened. Further, the record shows that the successful applicant for the vacant position was chosen on the basis of the two requirements stated, including a favorable view as to her personality. The same is true as to subsequent selection of a black employee who now works with Mrs. Pollard.

Mrs. Robbins could naturally suspect that race was a factor in the selection process because of the absence of black employees other than janitors and maids, and because of Mrs. Pollard's reference to age. Accordingly, she was entitled to a fair trial on the question whether defendant's failure to select her was based on racial bias. But defendant also was entitled to a fair trial and the record establishes that the trial was fair to both parties.

This court must certainly guard against a nibbling away of its record of firm and judicious efforts to support the elimination of illegal discrimination; but this case comes to us essentially as one involving standard of review and not civil rights. This case is not an appropriate one for the court to use to emphasize its continuing vigilance in the latter area; not with these facts; not with these parties; not with an unfairly imposed penalty on this clinic.

This appeal is based primarily if not entirely on the issue of alleged racial bias or animus on the part of Mrs.

Pollard. The evidence does not support such a finding. This would not even be a close case were it not for Mrs. Pollard's outdated, unacceptable, sterotypical descriptions, and her ingenuous inability to recognize them as such. But Title VII is not intended to and in any event could not possibly eliminate all of the sterotypical expressions in an imperfect world; its purpose is to assure that the *reason* for denial is not bias or animus. Mrs. Pollard seems obviously incapable of speaking in language which meets the test of modern race-free expression; so much so that the trial judge personally examined her closely and in detail on the question of discrimination on the basis of bias and prejudice. Her full testimony clearly showed that she had none; therefore none can be imputed to defendant. Plaintiff had her day in court, and the trial judge exercised his duty of close scrutiny and found that race played no part in Mrs. Pollard's decision to reject her. On the facts of this record, we should not substitute a contrary belief for the conclusion of the judge who conducted the trial. His decision is supported by the evidence. It should not be reversed. I respectfully dissent.

(Filed May 8, 1980)

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION
PCA 79-0424

DELORES J. ROBBINS,
Plaintiff,

vs.

WHITE-WILSON MEDICAL CLINIC, INC.,
Defendant

MEMORANDUM DECISION

Plaintiff, a black woman, has brought this action under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e *et seq.* and 42 U.S.C. §1981, alleging defendant denied her employment on the basis of race. Defendant at all relevant times has been an employer within the scope of Title VII. Jurisdiction is vested in this court under 42 U.S.C. §2000e-5(f)(3).

As set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-07 (1973), the order and allocation of proof in a Title VII suit such as this is as follows:

1. the plaintiff must establish a prima facie case of race discrimination;

2. the employer then has the burden of proving, by a preponderance of the evidence, that a legitimate and nondiscriminatory reason existed to support its action; and

3. the plaintiff must then be afforded an opportunity to show that the employer's articulated reason was a pretext for discrimination.

Ultimately, the burden of persuasion rests on the plaintiff, who must establish the statutory violation by a preponderance of the evidence. *Whiting v. Jackson State University*, ... F.2d ....., No. 78-1338 (5th Cir. 1980). Moreover, where, as here, "§1981 is used as a parallel basis for relief with §706 of Title VII against disparate treatment in employment, its elements appear to be identical to those of §706." *Whiting v. Jackson State University*, supra.

In order to establish a prima facie case, a plaintiff must show that she belongs to a protected minority, that she applied and was qualified for a job for which the employer was seeking applicants, was rejected, and, after her rejection, further applicants were sought. *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). At the pretrial conference on December 18, 1979, the court granted plaintiff's motion for summary judgment to the extent that plaintiff had established a prima facie case of discrimination and thereby shifted the burden to the defendant to establish, at trial, a legitimate nondiscriminatory reason for rejecting plaintiff's application for employment.

The case was tried before the court on May 6, 1980. Having completed its review of the evidence presented at trial, briefs of counsel, and all other relevant material, and heard arguments of counsel, the court now finds that defendant has established a legitimate nondiscriminatory reason for not hiring plaintiff and that plaintiff has not met her burden of showing that the articulated reason was a pretext for discrimination. Accordingly, defendant is entitled to have judgment entered in its favor.

Much of the factual matter in this case is not in dispute. Plaintiff was one of 14 applicants interviewed for the position of record room clerk. She was the only black applicant. The interviews were conducted by Marilyn

Pollard, the record room supervisor. Ms. Pollard had the authority to evaluate the applicants and recommend her choice for the position to Theodore Rahe, defendant's administrator. Her recommendation was afforded great weight and was routinely approved. In this instance, Ms. Pollard recommended Ms. Vicki Kraftchick be hired and the recommendation was followed.

The evidence shows that the interviews are unstructured with no objective criteria, other than minimal clerical skills, applied. Ms. Pollard makes a purely subjective decision as to which applicant to hire. An important requirement in this regard, however, is that the individual selected must possess a good personality and attitude enabling the applicant to relate well to other employees working in a small, pressure-filled environment. The employee must not only be able to get along with her fellow record room clerks but must also be able to get along with doctors and nurses, who place great demands upon the staff.

Both plaintiff and Ms. Pollard testified that Ms. Pollard was surprised that plaintiff was black. As Ms. Pollard testified, plaintiff was the first black applicant she interviewed in five years. However, the absence of black applicants was not the result of any deliberate action by the defendant. Ms. Pollard did not select the people to be interviewed and all applications on file contained no mention or clue as to the applicant's race.

During the interview, Ms. Pollard advised plaintiff as to the requirements of the job. Ms. Pollard, from her standpoint, did not believe plaintiff had the type of personality that would enable her to work well on the job. According to Ms. Pollard, plaintiff was stern, did not smile, and left her feeling intimidated. Ms. Pollard did not believe that plaintiff had the type of personality that

would go over. At the close of the interview Ms. Pollard told plaintiff she would be back in touch. A couple of record room employees commented that plaintiff appeared "too serious" but Ms. Pollard does not base her recommendations in any way upon comments by any of the record room personnel.

Ms. Pollard continued to interview applicants for the position. She did not rule anyone out until she interviewed Vicki Kraftchick. After interviewing Ms. Kraftchick, Ms. Pollard decided she was the right person for the position. In Ms. Pollard's opinion Ms. Kraftchick had a very pleasing personality and appeared to relate well to others. Many of the applicants, including plaintiff and Ms. Kraftchick, had the basic clerical skills to be qualified for the job. However, Ms. Kraftchick was, in Ms. Pollard's opinion, the most qualified applicant because she possessed a vital, albeit intangible, asset - an outgoing personality that was well-suited to a high pressure job. According to Ms. Pollard, Ms. Kraftchick would have been hired if she were black and plaintiff would not have been hired if she were white.

When she did not hear further from Ms. Pollard, plaintiff called to find out if the position had been filled. Ms. Pollard first told plaintiff she had not been hired because of her age. She did so because she was flustered and did not want to tell plaintiff that she had not had a good interview. Subsequently, plaintiff was informed of the basis for Ms. Pollard's decision.

Resolution of this case necessarily hinges upon the testimony of Ms. Pollard. While the absence of any objective criteria for employee selection calls for close scrutiny of the employment process, it is also true that "standards that are suitable and practical for large organizations cannot be made a Procrustean bed for small

ones." *Jenkins v. Caddo-Bossier Association for Retarded Children*, 570 F.2d 1227, 1229 (5th Cir. 1978). Given the nature of the position at issue, a requirement that an applicant have the type of personality that enables her to relate well to others and remain pleasant under stress is a legitimate one. In determining that Ms. Kraftchick had a personality better suited for the job than plaintiff, and in hiring her on that basis, defendant has demonstrated a legitimate nondiscriminatory reason for not hiring plaintiff.

Plaintiff has not met her burden in showing that the articulated reason was a pretext for discrimination. Simply put, this court does not believe that race played any part in Ms. Pollard's decision. Because proper resolution of this case depends so much upon the determination whether this witness was motivated by racial bias or animus in rejecting plaintiff's application, she was questioned closely. She was examined at some length particularly concerning some statements suggestive of racial bias that she volunteered in answering questions.

The conclusion is reached from all of her testimony that she possesses no racial bias or animus as such and racial bias or animus played no part in rejection of plaintiff's application. It seems apparent from her testimony that she associates in her own mind certain personality characteristics as being more prevalent in the white than in the black race. But she has no bias or prejudice against the black race. To her people are people regardless of their race.

The conclusion that racial bias or animus played no part in her rejection of plaintiff's application is bolstered by the fact that blacks are socially welcome in her home and have been in her home in that capacity. It is also bolstered by the fact that her own young son has a close

black friend and the two children, from time to time, have spent the night with each other in each other's respective homes.

In addition, Ms. Kraftchick, the applicant selected for the position, testified in court. As noted, Ms. Pollard testified that, she felt that a pleasing personality was of value in the somewhat strained environment in which those employed in the section of which she was supervisor had to work and to which she attached importance. On this court's observation of Ms. Kraftchick, it appeared to it as well that Ms. Kraftchick does indeed possess the kind of personality that Ms. Pollard testified she felt was so important.

It does not appear from a preponderance of the evidence that defendant has discriminated against plaintiff on account of her race. In this instance, however, the court also finds that plaintiff's claim was not frivolous, unreasonable, or groundless or that plaintiff continued to litigate it after it clearly became so. Thus, defendant is not entitled attorney's fees under 42 U.S.C. §2000e-5(k). *Lopez v. Arkansas County Independent School District*, 570 F.2d 241 (5th Cir. 1978). At post trial conference defendant agreed that under the factual situation here presented the defendant, if judgment were entered in its favor, could not recover attorney's fees, so that there was no need, in such event, for the court to reserve jurisdiction for the purpose of entertaining a motion for an award of such fees.

The clerk will enter judgment in favor of defendant and against plaintiff with this suit dismissed with prejudice and at plaintiff's cost.

DATED this 8th day of May, 1980.

/s/ Winston E. Arnow,
Winston E. Arnow, Chief Judge

Delores J. ROBBINS,
Plaintiff-Appellant,

v.

WHITE-WILSON MEDICAL CLINIC,
INC., Defendant-Appellee.

No. 80-5442
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
Unit B

April 9, 1981.

Plaintiff, a black female, brought employment discrimination suit alleging that defendant denied her employment on basis of race. The United States District Court for the Northern District of Florida, Winston E. Arnow, Chief Judge, entered judgment in favor of defendant, and plaintiff appealed. The Court of Appeals, Vance, Circuit Judge, held that even assuming that defendant had rebutted plaintiff's prima facie case of employment discrimination, evidence produced at trial clearly indicated that proffered explanation was pretextual.

Reversed and remanded.

1. Civil Rights (Key) 43, 44(1)

In an employment discrimination suit brought under Title VII, plaintiff has burden of proving by preponderance of evidence a prima facie case of discrimination, and if plaintiff succeeds in proving prima facie case, burden then shifts to defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection; should defendant carry this burden, plaintiff must then have an

opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendants were not its true reasons but were a pretext for discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Federal Courts (Key) 858

Finding of employment discrimination vel non is an ultimate fact subject to plenary review in a case brought under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights (Key) 43

In an employment discrimination suit brought under Title VII, defendant carries burden of production, not burden of proof, with respect to whether person actually hired was better qualified than that plaintiff. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights (Key) 44(1)

Even assuming legitimacy of employer's "personality" qualifications for records-room clerk position, where evidence established that entire evaluation process was restricted to job interview, that employment decision depended upon decision of interview, that interviewer had tendency to assume that blacks were less likely to have appropriate personality traits than whites, and that interviewer had first told plaintiff, a black female, that she had not been chosen because of her age but had later told plaintiff that she had not been selected because of her personality, evidence clearly indicated that proffered explanation for refusing to hire plaintiff was pretextual. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights (Key) 44(1)

In employment discrimination suit brought under Title VII, district court clearly erred in concluding that plaintiff failed to meet her burden of showing that articulated reason for failing to hire plaintiff was a pretext for discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

VANCE, Circuit Judge:

Plaintiff, a black female, filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981 alleging defendant denied her employment on the basis of race. After a non-jury trial the district judge concluded that defendant had established a legitimate nondiscriminatory reason for not hiring plaintiff and that plaintiff had not met her burden of showing that the articulated reason was a pretext for discrimination. Accordingly, the district judge ordered judgment to be entered for defendant. On appeal Robbins challenges the holding of the district court. We reverse.

Early in January 1978, Mrs. Robbins submitted an application for employment to the White-Wilson Medical Clinic, a privately owned medical clinic located in Fort Walton Beach, Florida that provides out-patient services to residents of northwest Florida and southern Alabama. Prior to the filing of Mrs. Robbins' E.E.O.C. charge, the only black employees at the clinic worked in janitorial and housekeeping positions. At the time Mrs. Robbins applied

for a position at the clinic there were no positions open; however, a job as record room clerk came open at the end of the month. Fourteen applicants, including Mrs. Robbins, were selected by Marilyn Pollard, the record room supervisor, for personal interviews. On February 3, 1978 Mrs. Robbins was personally interviewed for the record room clerk position by Mrs. Pollard. At trial Mrs. Pollard testified that when Mrs. Robbins appeared for the interview she was surprised to learn that she was black because in five years of interviewing she had never interviewed a black applicant. At the conclusion of the interview Mrs. Robbins was advised that there were other applicants to interview and that she would be called later and told whether she had been selected. When she received no word for several days, Mrs. Robbins telephoned the clinic. Mrs. Pollard told her that another applicant had been selected and stated that Mrs. Robbins had not been chosen because of her age. Shortly afterwards, Mrs. Robbins called the clinic administrator who denied that the clinic had discriminated against her because of her age which was thirty-seven. Mrs. Robbins then spoke with Mrs. Pollard again and accused her of discrimination. It was at this point that Mrs. Robbins was informed that she had not been selected because of her personality. After this second telephone conversation Mrs. Pollard made a notation on the margin of Mrs. Robbins' application: "Has a bad attitude—has called and asked many questions. She is a black girl. Could cause trouble. I don't need this one."

Mrs. Robbins filed a timely charge of discrimination against the clinic with the E.E.O.C. The E.E.O.C. failed to conclude its investigation within 180 days of filing; authorization was requested and received to file a civil suit in federal court. The instant action was filed on February 7, 1979. Before trial, the district court granted in part

plaintiff's motion for summary judgment, but only to the extent that the district court concluded that there existed no issue as to plaintiff establishing a prima facie case under the test provided by *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Defendant does not appeal from that ruling.

[1, 2] In *McDonnell-Douglas Corp. v. Green*, the Supreme Court set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802, 93 S.Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.* at 804, 93 S.Ct. at 1825. A finding of discrimination vel non is an ultimate fact subject to plenary review. *Thompson v. Leland Police Dept.*, 633 F.2d 1111, 1112 (5th Cir. 1980).[1]

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1. The court stated:

> The clearly erroneous standard of appellate review applies to subsidiary facts but does not apply to ultimate facts. A finding of discrimination or nondiscrimination falls into the category of ultimate fact, therefore we must make an independent determination of the allegations of discrimination. In the process we examine the record to see if the ultimate finding is supported by requisite subsidiary facts.

633 F.2d at 1112. *Accord, Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382-83 (5th Cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); *Causey v. Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975). The Supreme Court in *Texas Dep't. of Community Affairs v. Burdine*, ... U.S. ....., 101 S.Ct. 1089, 66 L.Ed.2d ..... (1981), did not reach the question of whether a finding of intentional discrimination should be viewed as an ultimate fact. *Id.* at ....., 101 S.Ct. at 1097 n.12.

[3] The Supreme Court has recently discussed the respective burdens of plaintiff and defendant under *McDonnell-Douglas* once a prima facie case has been established. *Texas Department of Community Affairs v. Burdine*, ... U.S. ....., 101 S.Ct. 1089, 66 L.Ed.2d ..... (1981). The opinion in *Burdine* altered the law in this circuit in two respects. Prior to *Burdine* we had held once the plaintiff had established a prima facie case of discrimination, the burden was upon the defendant to rebut this showing by a preponderance of the evidence. *Ray v. Freeman*, 626 F.2d 439, 443 (5th Cir. 1980). In addition, we required that the defendant prove that the person actually hired was better qualified than the plaintiff. *Falcon v. General Telephone Company of the Southwest*, 626 F.2d 369, 378 (5th Cir. 1980). In *Burdine* the Court rejected our interpretation of the defendant's burden:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

Id., ... U.S. at ....., 101 S.Ct. at 1094. It is thus clear that the defendant carries a burden of production, not a burden of proof.

The Supreme Court also stated that the employer need not demonstrate that the person actually hired was better qualified than the plaintiff. If the employer produces evi-

dence that on the basis of legitimate, nondiscriminatory criteria the person chosen for the job possesses qualifications equal to those of the plaintiff, he rebuts the prima facie case. "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.*, ... U.S. ....., 101 S.Ct. at 1097. We note that except on this issue, while *Burdine* changes the burden upon defendant, it does not change the substantive law developed in this circuit.

[4] We now apply the analysis mandated in *Burdine* to the facts of this case. At trial, the defendant attempted to show that it looked for two qualifications in applicants for the position of records room clerk. The first was certain minimal typing skills. Defendant concedes that Mrs. Robbins met this requirement and does not contend that she was denied the position on this ground.

The second qualification sought by the defendant related to personality. Defendant wanted a person who would get along well with the other employees in the working environment. For the purposes of this case we will assume the legitimacy of this qualification.[2]

The evidence shows, and the district court found, that the entire evaluation process was restricted to the job interview. Although the interviewer only made recommendations to the administrator, the recommendations were routinely approved. No guidelines had been set down for

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2. Plaintiff does not specifically challenge the legitimacy of this qualification. We do not wish to suggest, however, any general endorsement of the proposition that Title VII claims can be defeated simply by asserting a preference for certain types of personality traits. Defendant's testimony would not support a finding that particular characteristics are essential to the effective performance of the clerk's duties, as might be the case, for example, in certain selling situations. The record room clerk in fact, does not deal with the public at all. The only contact with individuals outside the record room seems to be in providing files for medical personnel.

the interviews, nor had the administrator ever sat in on a full interview. Everything, then, depended on the decision of the interviewer.

We have frequently noted the dangers involved in this sort of evaluation. "[S]ubjective selection processes involving white supervisors provide a ready mechanism for racial discrimination." *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 426 (5th Cir. 1980). *Accord, Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1385 (5th Cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 345 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). The Supreme Court in *Burdine* voiced similar concerns. The court stated that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific" in order to rebut the inference of discrimination arising from the prima facie case and to guarantee that "the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext." ..... U.S. at ....., 101 S.Ct. at 1096. Obviously, the more subjective the qualification sought and the more subjective the manner in which it is measured, the more difficult it will be for the defendant to meet the burden imposed by the court in *Burdine*.

Testimony presented at trial in this case heightens our concern. When defendant's attorney questioned the interviewer about black employees who had been hired after Mrs. Robbins' rejection, the colloquy was as follows:

> Q. What about Donna Richardson? Is she presently in your department?
>
> A. Yes, and she's real jolly and fun to be with.
>
> Q. And how does she relate to the other people in the department?

A. Well, she's more white than she is black. Does that answer your question?

THE COURT: Well, I'm not sure I understand what you mean. Is her race black?

A. Uh-huh.

THE COURT: But she's, in your thinking, more white than she is black?

A. Yeah. She's, you know, she's—her father was military, right, so if you're military, well, you know, you're not a military man but if you've been in the military you're around a lot of black and white people. You go to school with a lot of whites, right, if you're in the military, especially overseas. My kids did.

THE COURT: But you make a distinction between white people and black people in your thinking, and she's more white than black?

A. Yes, she is.

THE COURT: What does that distinction mean between black people and white people, that she's more white?

A. Well, she's just, I think of her as being very normal, just, I mean, being just like—I feel like she's just a white person. I don't think of her—you're saying is she black or white. I'm saying as far as I'm concerned she's white.

The trial judge was properly concerned by these remarks, and questioned the interviewer carefully. Further testimony concerning Mrs. Pollard's social relationships showed no evidence of racial prejudice. The court found that while "she associates in her own mind certain personality characteristics as being more prevalent in the white than in the black race," nevertheless "she possesses no racial bias or animus as such." We agree that the evi-

dence supports these findings, but we believe that the court below drew incorrect legal conclusions from them.

This case is factually distinguishable from one involving promotion or termination in assessing whether defendant met its burden under *McDonnell-Douglas*. In her long term relationships with other people, Mrs. Pollard may judge them as individuals and not as members of a particular race. In the hiring process as conducted by defendant, however, there is no opportunity for a long term relationship to develop. The initial reaction of the interviewer was crucial. In this context, a tendency by the interviewer to assume that blacks are less likely to have appropriate personality traits than whites inevitably distorts the evaluation.

It is thus doubtful that defendant has articulated a "legally sufficient" explanation for refusal to hire plaintiff in the "clear and reasonably specific" manner required by *Burdine*. Even assuming that defendant has rebutted plaintiff's prima facie case, the evidence produced at trial clearly indicates that the proffered explanation was pretextual. We believe that this is one of those "cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant will suffice to discredit the defendant's explanation." *Burdine*, ... U.S. at ....., 101 S.Ct. at 1095 n.10.

[5] Accordingly, we reverse and direct that judgment be entered for the plaintiff.[3]

REVERSED AND REMANDED.

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3. Our result would be the same were we to apply the clearly erroneous standard. This court is "left with the definite and firm conviction that a mistake has been committed." *Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980), quoting *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948).